Supreme Court, U.S.
FILED

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IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

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Isidoro Rodriguez, and his minor Son,
Isidoro Rodriguez-Hazbun

Petitioners,

v.

Amalin Hazbun Escaf,

Respondent.

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On Petition For Writ of Certiorari
United States Court of Appeals for the Fourth Circuit

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# PETITION FOR WRIT OF CERTIORARI
# APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 7, 2003

No. 02-1487
CA-01-1926-A

AMALIN HAZBUN ESCAF

Petitioner - Appellee

v.

ISIDORO RODRIGUEZ

Respondent - Appellant

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On Petition for Rehearing En Banc

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The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

| | | |
|---|---|---|
| AMALIN HAZBUN ESCAF,<br>Plaintiff-Appellee, | | |
| v. | | No. 02-1487 |
| ISIDORO RODRIGUEZ,<br>Defendant-Appellant. | | |

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
T. S. Ellis, III, District Judge.
(CA-01-1926-A)

Argued: October 29, 2002

Decided: December 11, 2002

Before WILKINS, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

**COUNSEL**

**COUNSEL:** Isidoro Rodriguez, THE RODRIGUEZ LAW FIRM, Alexandria, Virginia, for Appellant. Patrick Hanley Stiehm, STIEHM LAW OFFICE, Alexandria, Virginia, for Appellee. **ON BRIEF:** Stephen J. Cullen, MILES &STOCKBRIDGE, P.C., Towson, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

## OPINION

PER CURIAM:

This case is brought under the Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 19 I.L.M. 1501 (Hague Convention). Isidoro Rodriguez appeals the district court's order requiring (pursuant to the Hague Convention) the return of his thirteen-year-old son, Isidoro, to Colombia, Isidoro' s country of habitual residence and the residence of his mother. We affirm.

I.

Amalin Hazbun Escaf (Hazbun), a Colombian citizen, married Isidoro Rodriguez (Rodriguez), a U.S. citizen, in Colombia in 1988. They lived in Barranquilla, Colombia after the marriage. In 1989 the couple had a son, Isidoro Rodriguez Hazbun (Isidoro), and Isidoro has joint Colombian-U.S. citizenship. Hazbun and Rodriguez divorced in 1997, and both continued to live in Barranquilla. Rodriguez claims that he and Hazbun had an initial oral agreement providing that Isidoro would split his time evenly between his parents; Hazbun disputes this. In August 1997 a Colombian family court approved a different custody agreement entered into between Hazbun and Rodriguez. The court-approved agreement provided that Isidoro would live primarily with his mother, but would spend every other weekend with his father.

Rodriguez returned to the United States in January 2000, taking up residence in Virginia. Later in 2000 Isidoro spent summer and Christmas vacations with Rodriguez in the United States. After Isidoro returned to the United States for a visit during the summer of 2001, Rodriguez filed (in Isidoro's name) a petition for a change of custody in the Fairfax County, Virginia, Juvenile and Domestic Relations Court. Rodriguez then sent a

facsimile transmission to Hazbun, telling her that Isidoro would be staying in the United States and would not be returning to Colombia. Included in the transmission to Hazbun was (1) a letter from Isidoro to his mother, saying that he wanted to stay with his father and (2) a copy of the petition for change of custody.

In August 2001 Hazbun filed a Hague Convention Return Application with the Colombian Civil Authority, seeking Isidoro's return to Colombia under the Hague Convention. In December 2001 Hazbun sued Rodriguez in federal court in the Eastern District of Virginia, asking for an order requiring Isidoro's immediate return to Colombia under the Hague Convention and its implementing legislation, 42 U.S.C.A. § 11601 et seq. (West 1995 & Supp. 2002).

Rodriguez filed a motion to dismiss Hazbun's complaint, raising several issues that were thoroughly considered by the district court. First, the district court rejected Rodriguez's argument that it lacked subject matter jurisdiction, concluding that jurisdiction was proper under 42 U.S.C.A. § 11603(a). Second, the district court rejected Rodriguez's argument that Isidoro was an indispensable party in the federal lawsuit and that the failure to join him was grounds for dismissal. Because a Hague Convention proceeding deals with the rights of those claiming custody, Hazbun and Rodriguez in this case, the court determined that it could afford complete relief to the parties without joining Isidoro. The court thus concluded that Isidoro was not an indispensable party, although the court was careful to note that his rights and wishes could be taken in account. Third, the district court rejected Rodriguez's arguments that it should abstain from deciding the Hague Convention case while a state custody proceeding was pending. The court determined that *Younger v. Harris*, 401 U.S. 37(1971), did not require it to abstain. The court noted that *Younger* calls for federal courts to abstain from decision when (1) a concurrent state proceeding is pending, (2) an important state interest is implicated, and (3) the

parties may seek review of their federal claims instate court. The court concluded that Rodriguez's argument failed on the second Younger requirement because Hague Convention cases implicate only the international movement of children, which is a federal, rather than a state, interest. The district court also declined to abstain based on *Colorado River Water Conservation District v. United States,* 424 U.S. 800 (1976), which applies only when ongoing federal and state proceedings are parallel. Because the federal and state proceedings here do not involve the same parties and issues, the court concluded that they are not parallel and that *Colorado River* does not apply.

After denying Rodriguez's motion to dismiss, the district court held a bench trial to determine whether Isidoro had been "wrongfully removed or retained in" the United States, a country that is a party to the Hague Convention. In its final opinion, which set forth findings of fact and conclusions of law, the district court found that Colombia was Isidoro's habitual residence and that he had been wrongfully retained in the United States. The court then considered and rejected possible defenses to Hazbun's claim that Isidoro should be returned to Colombia. First, the district court determined that Rodriguez had not presented clear and convincing evidence that Isidoro would be at grave risk if be returned to Colombia. Second, the court determined that Isidoro who said that his preference was to remain in the United States for now, but that later he wanted to spend equal time in the United States and Colombia was not of a sufficient age and maturity for his views to be given conclusive weight. The district court ultimately concluded that the Hague Convention and 42 U.S.C.A. 11603 et seq. required that Isidoro be returned to Colombia forthwith, and an order to that effect was entered. After Rodriguez was unsuccessful in his efforts in this court and in the Supreme Court to obtain a stay pending appeal, Isidoro was returned to Colombia on June 11, 2002, pursuant to the district court's order.

II.

Rodriguez appeals, challenging the district court's decision that Isidoro is not an indispensable party, its refusal to abstain, and its determination that Rodriguez did not establish a defense under the Hague Convention. Rodriguez also asserts that the proceedings in district court violated his parental rights and Isidoro's due process rights.

The district court noted that this case arises from "an exceptionally difficult situation" for Isidoro and for the parties. We agree. Accordingly, we have carefully considered the briefs, the joint appendix, and the oral arguments. We conclude that the proceedings in district court did not violate either Rodriguez's or Isidoro's rights. As to the other issues, we affirm on the reasoning of the district court. See *Hazbun v. Rodriguez*, 191 F. Supp. 2d 685 (E.D. Va. 2002) (opinion denying motions to dismiss); *Hazbun v. Rodriguez*, 200 F. Supp. 2d 603 (E.D. Va 2002) (memorandum opinion containing findings of fact and conclusions of law).

*AFFIRMED*

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

| | |
|---|---|
| AMALIN HAZBUN ESCAF, | ) |
| Petitioner, | ) |
| | )Civil Action No. 01-1926-A |
| | )(191 F.Supp 2d 685- |
| | ) E.D.Va 2002) |
| ISIDORO RODRIQUEZ,[1] | ) |
| | ) |
| Respondent. | ) |

## MEMORANDUM OPINION

Amalin Hazbun Escaf brought this suit under the Hague Convention on the Civil Aspects of International Child Abduction[2] (Hague Convention) and the International Child Abduction Remedies Act[3] (ICARA) to secure the return of her son to Colombia from the keep of Isidoro Rodriguez Cruz, the

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The caption of the complaint lists respondent's name as "Rodriquez" with a "q," but all other pleadings spell the name "Rodriguez" with a "g". The more common "Rodriguez" spelling will be used here in all instances except in the caption.

2

Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 1988 WL 411501 (entered into force Dec. 1, 1983; for the United States July 1, 1988; for Colombia March 1, 1996; between Colombia and the United States June 1, 1996).

3

42 U.S.C. § 11601 Ct seq. The statute implements the Hague Convention in the United States and specifically states that its provision "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C. § 1 1601(b)(2).

child's father. Central to the resolution of the pending motion is whether the *Younger*[4] or *Colorado River*[5] abstention doctrines counsel that this case be stayed or dismissed[6] in favor of a child custody matter pending in Virginia state court, in which the Hague Convention issue has not been formally raised.

I.[7]

The child in issue here is Isidoro Rodriguez Hazbun, a thirteen-year-old boy born in Barranquilla, Colombia[8] on March 10, 1989 to petitioner Amalin Hazbun Escaf (Hazbun), a citizen and resident of Colombia, and her then husband, respondent

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[4]*Younger v. Harris*, 401 U.S. 37 (1971).

[5]*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

[6]*Younger* abstention contemplates the dismissal of the federal suit and the presentation of all claims to the state court. *See Gibson v. Beriyhill*, 411 U.S. 564, 577 (1973). *Colorado River* abstention may result either in a stay or outright dismissal of the federal suit, *see Moses H. Cone Mem 'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13—16 (1983), but in either case the state court decision will have preclusive effect. *See Wilton v. Seven Falls Co., 515* U.S. 277, 283—85 (1995).

[7]It is proper to consider matters outside the pleadings for purposes of a motion to dismiss that is based on (i) a challenge to the Court's subject matter jurisdiction; (ii) failure to join a necessary and indispensable party; or (iii) abstention. *See* Fed. R. Civ. P. 12(b); *Hammond v. Clayton*, 83 F.3d 191, 192 (7th Cir. 1996). Accordingly, the facts recounted here are those uncontested facts taken from the pleadings and accompanying affidavits.

[8]The child is an American citizen by virtue of his father's citizenship.

Isidoro Rodriguez Cruz (Rodriguez), an American citizen now residing in Virginia.[9] For approximately six years, the family resided in Barranquilla, making occasional trips to the United States. Then, in *1995,* Hazbun and Rodriguez separated, ultimately divorcing in 1997. During the period of the separation, the child, Isidoro, resided chiefly with Hazbun in Barranquilla. In two separate decrees issued in August 1997, several months before the divorce, the Family Court of Barranquilla, Colombia approved a custody agreement in which the child would reside with and be primarily in the care of Hazbun, but would spend every other weekend with Rodriguez[10]. The summer holidays were to be divided evenly with Isidoro spending equal time with each parent. Both parents were to share the right and responsibility for the education and the moral and intellectual upbringing of their child. In this regard, Rodriguez was to retain certain responsibilities for taking Isidoro to evening sports practices and academic lessons. The Barranquilla Family Court clarified in a second order that Hazbun retained formal custody of Isidoro[11].

It appears from the record that some time after the divorce Rodriguez began to spend most of his time in Virginia, and Isidoro made annual trips to this country during the summer to spend time with his father in Virginia. During the last of these trips, in June and July of 2001, Isidoro allegedly determined that he wanted to stay in the United States and not return to Colombia. Since then,

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Rodriguez worked for many years in Colombia and maintains law offices in Alexandria, Virginia and Barranquilla, Colombia.

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*See Ama/in Hazbun Escaf v. Isidoro Rodriguez Cruz* (First Family Court, Barranquilla, Colombia Aug. 1, 1997).

11

*See Amolin Hazbun Escaf v. Isidoro Rodriguez Cruz*, Ref No. 23.833 (First Family Court, Barranquilla, Colombia Aug. 26, 1997).

Isidoro has remained in the United States in the care of Rodriguez and in violation of the custody orders of the Barranquilla Family Court.

In July 2001 Isidoro filed suit against his mother in the Fairfax County Juvenile and Domestic Relations Court[12] to modify the custody agreement between Hazbun and Rodriguez based on a material change of circumstance. Specifically, the petition seeks an order that Rodriguez be granted sole custody of Isidoro and that Isidoro not be required to return to Colombia. In turn, Hazbun filed this suit against Rodriguez on December 20, 2001 seeking return of the child under ICARA and the Hague Convention. Rodriguez has now filed a motion to dismiss (i) for lack of subject matter jurisdiction[13], (ii) for failure to join the child as an indispensable party,[14] and (iii) for abstention pursuant to *Younger*[15].

II.

The Hague Convention establishes legal rights and procedures for the prompt return of children who have been "wrongfully removed to or retained in" a nation that is a party to the Convention. Hague Convention, art.1; 42 U.S.C. 11601(a). The nations that adopted the Hague Convention sought "to protect children internationally from the harmful effects of their

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[12]*Isidoro Rodriguez-Hazbun v. Amalin Hazbun Escaf,* Case No. JJ-347-050-01-01 (Juv. & Dom. Rel. Ct. of Fairfax Cty, filed July 13, 2001).

[13]*See* Rule 12(b)(1), Fed. R. Civ. P.

[14]*See* Rules 12(b)(7) & 19, Fed. R. Civ. P.

[15]Also pending is Rodriguez's motion for Rule 11 sanctions. Given the resolution of the underlying motion to dismiss, the motion for sanctions is without merit and must be denied.

wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, preamble. Thus, the primary purpose of the Hague Convention is "to preserve the status quo" with respect to child custody and to deter feuding parents from "crossing international boundaries in search of a more sympathetic [custody] court." *Miller v Miller*, 240 F. 3d 392, 398 (4th Cir. 2001). The scope of a court's inquiry under the Hague Convention is limited to the merits of the claim for wrongful removal or retention. *See* 42 U.S.C. §11601(b)(4); Hague Convention, art. 16. Accordingly, the merits of any underlying custody case are not at issue. *See Miller*240 F. 3d at 398; Hague Convention, art. 19[16].

ICARA, enacted in 1988, established procedures for the implementation of the Hague Convention in the United States. In this regard, it defined and allocated the burdens of proof for various claims and defenses under the Hague Convention. *See* 42 U.S.C. § 11601 *et seq.*[17] Specifically, ICARA requires that a petitioner under the Hague Convention establish, by a preponderance of the evidence, that the child whose return is sought has been "wrongfully removed or retained within the

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Although some of the defenses to the return of a child under the Hague Convention raise issues that may mirror those in a custody dispute, *see e.g.*, Hague Convention, art. 13(b) (a court is not bound to order return if it would expose the child to grave risk of physical or psychological harm), the purpose of the Hague Convention proceeding is not to determine the best interests of the child, as is true in a custody dispute. *See infra* notes 30, 31, & 36 and accompanying text.

17

Cases brought pursuant to ICARA and the Hague Convention are tried to a judge, as neither ICARA nor the Hague Convention provides for trial by jury and the available remedy—return of the child—is equitable in nature. *See Silverman v. Silverman*, 2002 WL 264932 (D. Minn. Feb 21, 2002).

meaning of the Convention." 42 U.S.C. § 1 1603(e)(l)(A). Thus, in this matter, Hazbun must prove by a preponderance of the evidence (i) that her child was habitually resident in Colombia at the time Rodriguez retained the child in the United States; (ii) that the retention was in breach of Hazbun's custody rights under Colombian law, and (iii) that she had been exercising those custody rights at the time of retention. *See Miller,* 240 F.3d at 398; Hague Convention, art. 3.

A respondent opposing the return of a child may prevail if he or she establishes certain defenses designated by ICARA and available under the Convention.[18] Thus, Rodriguez might prevail in this matter if he establishes by clear and convincing evidence (i) that there is a grave risk that returning the child to Hazbun in Colombia would expose the child to physical or psychological harm or otherwise place him in an intolerable situation[19], or (ii) that the return of the child to Colombia would not be permitted by the fundamental principles of the United States "relating to the protection of human rights and fundamental freedoms."[20] Rodriguez also might prevail if he establishes by a preponderance of the evidence that Hazbun "was not actually exercising the custody rights at the time of. retention,"[21] or if it is shown that

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[18]*See* 42 U.S.C. § 1 1603(e)(2)(A) (requiring proof, by clear and convincing evidence, that one of the exceptions set forth in article 13b or 20 of the Hague Convention applies); 42 U.S.C. § 11603(e)(2)(B) (requiring proof, by a preponderance of the evidence, that some other exception set forth in article 12 or 13 of the Hague Convention applies).

[19]Hague Convention, art. 13b.

[20]Hague Convention, art. 20.

[21]Hague Convention, art. 13a.

degree of maturity at which degree of maturity at which it is appropriate to take account of views."[22]

There is an important distinction, often overlooked, between a Hague Convention petition brought pursuant to ICARA and a petition to determine the legal custody of a minor. To be sure, a Hague Convention petition affects custody, but it is not a custody determination. *See* Hague Convention, art. 19. And significantly, the Hague Convention, which is the "Law of the Land,"[23] specifically directs that courts "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention." Hague Convention, art.16. The intention and effect of the Hague Convention, then, is to "lend priority to the custody determination hailing from the child's state of habitual residence." *Miller*, 240 F.3d at 399. Thus, a state court of competent jurisdiction may proceed to determine legal custody only where that court or a federal district court first finds that the petitioner cannot prove wrongful removal or retention or where the respondent establishes one of the available affirmative defenses.

## III.

The first two grounds cited in Rodriguez's motion to dismiss, namely lack of subject matter jurisdiction and failure to join a necessary and indispensable party, are without merit. With respect to the first ground, Rodriguez confuses jurisdiction with

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22 Hague Convention, art. 13, ¶ 2.

23 U.S. Const. art VI, cl. 2 ("This Constitution,. . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.")

the merits of the petition for the child's return: Each of his arguments goes to the merits of the Hague Convention petition rather than to the issue of jurisdiction. With respect to the second ground, it is clear from the Hague Convention and ICARA that the child whose return is sought is not a necessary party to the judicial proceedings.

*A. Subject Matter Jurisdiction*

Rodriguez makes six contentions in support of his argument that this Court lacks subject matter jurisdiction to decide the Hague Convention petition. Each of the first five contentions[24] relates to an element of proof required either of the petitioner who seeks a child's return or of the respondent who opposes that return. Each contention will, at the proper time, be the subject of fact finding in determining the merits of the petition, but none relates to the Court's power to adjudicate the merits.

The sixth contention—that the Court lacks authority to

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[24]Rodriguez's first five contentions are:

1. that the "habitual residence" of the child is the Commonwealth of Virginia, not Colombia, *see* 42 U.S.C. § 11603(e)(1)(A); Hague Convention, art. 3a;
2. that Hazbun was not actually exercising the custody rights under the custody agreement, *see* Hague Convention, art. 1 3a;
3. that the child would be in grave risk of physical harm if returned to Colombia, *see* Hague Convention, art. 13b;
4. that the Court should respect the wishes of the child that he not be returned in light of his age and maturity, *see* Hague Convention, art. 13, ¶2; and
5. that the return of the child would not be permitted by the fundamental principles of the United States relating to the protection of human rights and fundamental freedoms, *see* Hague Convention, art. 20.

order the return of the child unless the requirements of Virginia domestic relations law have been satisfied—is based on a mistaken interpretation of § 11604 of ICARA[25]. That section is concerned with provisional remedies "to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition." 42 U.S.C. § 11604(a). The requirement in § 11604(b) that the strictures of state law must be satisfied before ordering the removal of a child from a person having physical control of the child relates only to *provisional* measures that a court may take, not to the final disposition of the petition. Simply put, § 11604 establishes a prerequisite for certain provisional remedies; it does not address jurisdiction to adjudicate a Hague Convention petition. Instead, ICARA explicitly provides that United States district courts and the courts of the states "shall have concurrent original jurisdiction of actions arising under the ague] Convention." 42 U.S.C. § 11603(a). A petition for return of a child is properly heard by "any court which has jurisdiction. . . in the place where the child is located at the time the petition is filed." *Id.* § 11603(b). Given that the child was residing within this division at the time the petition was filed, subject matter

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*See* 42 U.S.C. § 11604, which reads in relevant part:

(a) Authority of courts

[A]ny court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

(b) Limitation on authority

No court exercising jurisdiction of an action brought under section 11603(b) of this title may, under subsection (a) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

jurisdiction exists here.[26]

*B. Indispensable Party*

Whether a party is indispensable requires a two-step inquiry. *See* Rule 19, Fed.R.Civ.P.; *Owens-Illinois Inc. v. Meade*, 186 F.3d *435*, 440 (4th Cir. 1999). First, it must be determined whether a party is "necessary" pursuant to Rule 19(a). *See Owens-Illinois*, 186 F.3d at 440. And second, if a necessary party cannot be joined for some reason, it must be determined whether the party is "indispensable" to the case, in that the party's appearance is so essential that the case must be dismissed. *Id.*

A party is necessary under Rule 19(a) if the party's presence is needed to afford "complete relief to those already parties." Rule 19(a)(1). Given this, it is clear that joinder is inapplicable here because complete relief can be afforded among those persons already parties to the suit. This is so because a Hague Convention petition brought pursuant to ICARA concerns only the rights of those claiming custody of a child,[27] in this case Hazbun and Rodriguez. Any relief ordered here under the Hague Convention and ICARA will be directed solely to Hazbun or Rodriguez, not to Isidoro. Thus, if Hazbun prevails on her petition, Rodriguez will be ordered to return Isidoro to Hazbun in Colombia, whereas if Rodriguiez prevails, he will not be ordered to return Isidoro to Colombia and he will then have an opportunity to pursue his change of custody remedy in an appropriate state

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[26]Rodriguez mistakenly relies on *Miller* in support of his jurisdictional argument. There, the Fourth Circuit affirmed a district court's exercise of jurisdiction to order the return of a child to Canada pursuant to a Hague Convention petition. *Miller*, 240 F.3d at 403. *Miller* provides no support for Rodriguez's position.

[27]*See* 42 U.S.C. §~ 11601—11604; Hague Convention, *passim*.

court. Of course, this does not mean that a child who is the object of a Hague Convention and ICARA suit has no role to play in that suit. In appropriate circumstances, the rights and wishes of the child may be considered during the proceeding,[28] but it does not follow that the child is a necessary party to the proceeding. Accordingly, Rodriguez's motion to dismiss on this ground must fail.

## IV.

Rodriguez's request for dismissal based on abstention meets the same fate. Federal courts have a "virtually unflagging obligation. . . to exercise the jurisdiction given to them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Yet, the Supreme Court has fashioned a number of abstention doctrines based upon the federal courts' prerogative to withhold equitable or quasi-equitable forms of relief, such as the relief sought here. The legal principles governing these abstention doctrines are well settled and "begin with the fundamental proposition that 'abstention from the exercise of federal jurisdiction is the exception, not the rule." *Richmond, Fredericksburg & Potomac RR Co. v. Forst*, 4 F.3d 244, 251 (4th Cir. 1993) (quoting *Colorado River*, 424 U.S. at 813). Of the various abstention doctrines, two are relevant here: *Younger* abstention and *Colorado River* abstention.

### *A.* Younger *Abstention*

The *Younger* abstention doctrine is designed to preserve comity between the national government and the states by precluding federal court proceedings when the federal claims "have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Cinema Blue of Charlotte*

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[28] *See* 42 U.S.C. § 11603; Hague Convention, arts. 13, 20,

*v. Gilchrist*, 887 F.2d 49, 52 (4th Cir. 1989). Accordingly, the exercise of *Younger* abstention is appropriate only where three conditions are met: (i) where there is an ongoing state judicial proceeding, (ii) where the proceeding implicates important state interests, and (iii) where there is an adequate opportunity to present the federal claims in the state proceeding. *Employers Res. Mgmt. Co. v. Am. Employers Benefit Trust, 65* F.3d 1126, 1134 (4th Cir. 1995). A state interest is important for purposes of the second *Younger* abstention factor where "exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987).

The first requirement for *Younger* abstention appears to be satisfied here as there is an ongoing state judicial proceeding—the child's custody petition pending in Fairfax County Juvenile and Domestic Relations Court—in which the federal claim under ICARA and the Hague Convention could be raised. Although the Hague Convention claim has not been formally asserted in the state court petition, this is not conclusive because it matters only whether the claim *"could be raised"* in the state proceeding. *See Cinema Blue*, 887 F.2d at 52 (emphasis added). And in this respect, it appears the Hague Convention claim *could* be raised in that court given that state courts have original jurisdiction (concurrently with federal courts) over claims brought under ICARA and the Hague Convention. *See* 42 U.S.C. § 11603(a)[29].

The other two *Younger* factors, however, counsel against abstention in this case. First, there is substantial doubt that

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[29]Juvenile and Domestic Relations courts in Virginia have jurisdiction over matters involving "control or disposition" of a child where custody or visitation is in controversy, *see* Va. Code § 16.1-241, which would arguably encompass a Hague Convention petition.

Hazbun will have an adequate opportunity to raise her Hague Convention claim in the state proceeding, as the claim currently is not formally before the state court and the proceedings currently scheduled in that court concern only the merits of the state custody dispute. More significantly, the *Younger* requirement that the federal proceeding implicates important state interests is plainly not met here and abstention should fail on that basis alone. Although a state has a manifest interest in the outcome of a child custody dispute adjudicated in its courts,[30] the resolution of a custody dispute is not at issue in a Hague Convention petition. Rather, such a petition addresses only the propriety of the removal or retention of a child across national boundaries, and thus implicates an important *federal* interest in foreign relations and the enforcement of United States treaty obligations. Deference to a state court's interest in a custody dispute is especially problematic in the context of a Hague Convention claim because ICARA and the Convention explicitly "divest[] the state of jurisdiction over. . . custody issues until the merits of the Hague Convention claim have been resolved."[31] To address the custody dispute before the Hague Convention petition is resolved would violate the direction of the Hague Convention that courts "shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention." Hague Convention, art. 16. Accordingly, the state court's interest in the custody matter does not arise until the Hague Convention and ICARA issues have been decided. It follows that no substantial comity concerns exist in the instant circumstances and *Younger* abstention is not warranted.

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30 *See Moore v. Sims*, 442 U.S. 415, 435 (1979) (recognizing that family relations are a traditional area of state concern).

31 *Grieve v. Tamerin*, 269 F.3d 149, *153* (2d Cir. 2001) (citing 42 U.S.C. § 1 1601(b)(4)); Hague Convention, art. 16; *see also Miller*, 240 F.3d at 398.

Federal courts of appeals addressing this issue have reached the same result[32]. District court results, however, are not uniform.[33] But those reaching a contrary result are either distinguishable on their facts or unpersuasive on their reasoning.[34]

In the end, while there is little doubt that the state court would be a competent forum in which to raise the Hague Convention claims, those claims are now properly before this Court and the state's substantial interest in the custody dispute is

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[32]See *Grieve*, 269 F.3d at *153* (state interests in custody issues do not raise substantial comity concerns that require *Younger* abstention); *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) ("abstention principles do not permit an outright dismissal of a Hague petition").

[33]*See, e.g., Friedrich v. Thompson*, No. 99CV00772, 1999 U.S. Dist. LEXIS 21305 at *8_*10 (M.D.N.C. Nov. Nov. 26, 1999) (finding no basis for abstention). *But see Cent v. Cent*, Civ. No. 0 1-00826 BMK, 2002 WL 340835 (D. Haw. Feb. 8, 2002) (abstaining under *Younger* and *Colorado River); Bouvagnet v. Bouvagnet*, No. 01 C *4685*, 2001 WL 1263497 (ND. Ill. Oct. 22, 2001) (abstaining under *Younger); Grieve v. Tamerin*, No. 00-CV-3824 JG, 2000 WL 1240199 (E.D.N.Y. Aug. *25*, 2000) (abstaining under *Younger), aff'd on other grounds, Grieve*, 269 F.3d 149 (2d Cir. 2001).

[34]*Cerit* is distinguishable because the Hague Convention issue there had been squarely presented and substantially argued in the state court proceeding. The federal district court found that the petitioner had selected the state court as the forum for bringing his Hague Convention petition. *See Cent*, 2002 WL 340835 at *3_*4, *~*7• To the extent that the district courts in *Cent, Btuvagnet* and *Grieve* found that an important state interest was implicated in a Hague Convention petition because of the state's concern with domestic relations, they inappropriately disregarded ICARA's and the Hague Convention's mandate that a decision on the Hague Convention petition be rendered prior to and without regard to the merits of any underlying child custody claims. *See* 42 U.S.C. § 1160 1(b)(4); Hague Convention, art. 16; *Grieve*, 269 F.3d at 153.

a question that must await resolution of the Hague Convention claim before it can properly be addressed.

*B. Colorado River Abstention*

The *Colorado River* abstention doctrine allows a district court to abstain from adjudicating a controversy before it in favor of parallel state proceedings only under "exceptional" circumstances "for reasons of wise judicial administration." *Colorado River*, 424 U.S. at 817—18. Before determining that abstention is warranted, a district court must first determine whether the state and federal proceedings are parallel. *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991). Suits are considered parallel if "substantially the same parties litigate substantially the same issues in different forums." *Id.* This suit and the suit in Fairfax County Juvenile and Domestic Relations Court do not qualify as parallel proceedings in either respect; neither the parties nor the issues are substantially the same. Because the child, not the father, is the petitioner in the state court suit, the father is not a party to that suit. This is significant because Hague Convention relief in this case will be directed to the parents, not the child. Further, because this suit concerns *only* ICARA and the Hague Convention, but not the underlying custody dispute, the issues in the two suits are not substantially the same. Accordingly, the threshold test for the exercise of *Colorado River* abstention—the existence of parallel proceedings—is not met here.

Assuming, *arguendo*, the contrary, *Colorado River* abstention would nonetheless be unwarranted here. Even where state and federal proceedings are parallel, a court must consider and balance several factors to determine whether it is proper to abstain. The factors include (i) the assumption by either court of jurisdiction over property; (ii) the inconvenience of the federal forum; (iii) the desire to avoid piecemeal litigation; (iv) the order in which jurisdiction was obtained; and (v) the source of

applicable law. *New Beckley,* 946 F.2d at 1073—74 (citing *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, *15—16* (1983); *Colorado River,* 424 U.S. at 818). If the balance of factors weighs against abstention, the federal suit should proceed despite the existence of parallel proceedings.[35]

The first factor is irrelevant, as there is no property over which to assume jurisdiction. The second factor, the convenience or inconvenience of the federal forum, is neutral, as the federal and state courts are in close geographic proximity and both are equally distant and inconvenient for Hazbun. *The third* factor, the desire to *avoid* piecemeal *litigation, does* not arise because the issues in the two proceedings are not congruent.[36] The fourth factor, the order in which jurisdiction was obtained, favors the federal forum as the Hague Convention question is not before the state court. Finally, the fifth factor, the source of applicable law, clearly counsels against finding the exceptional circumstances that warrant abstention. The presence of federal questions weighs heavily against abstention[37], and the source of applicable law here is solely federal. Thus, the balancing of factors counsels

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[35]*See Lops v. Lops,* 140 F.3d 927 (11th Cir. 1998) (finding no basis for *Colorado River* abstention in a Hague Convention proceeding after weighing the factors, despite the existence of parallel proceedings).

[36]Courts determining custody in Virginia "give primary consideration to the best interests of the child." Va. Code § 20-124.2; *see also Farley v. Farley,* 387 S.E.2d 794 (Va. Ct. App.,1990). By comparison, the success of a Hague Convention petition turns primarily on other factors, including the child's habitual residence and the exercise of custody rights. *See* Hague Convention, arts. 3, 13.

[37]*See Moses H. Cone,* 460 U.S. at 26 ("[T]he presence of federal law issues must always be a major consideration weighing against surrender."); *Colorado River,* 424 U.S. at 815 n.21 ([T]he presence of a federal basis for jurisdiction may ra[illegible] the level of justification needed for abstention.").

compellingly against the exercise of *Colorado River* abstention.[38]

The general principles expressed in the preamble of the Hague Convention also weigh against abstention here. Given the primary purpose of the Hague Convention "to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic [custody] court," *Miller*, 240 F. 3d at 398, the forum choice of the party seeking the return of a child under the Convention deserves considerable deference. In sum, abstention in this action under either the *Younger* or *Colorado River* abstention doctrines is inappropriate.

V.

In accordance with these principles, Rodriguez's motion to dismiss the petition must be denied. An appropriate Order has issued.

Alexandria, Virginia
March 21, 2002

/S/
T.S. Ellis, III
United States District Judge

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[38] This case is readily distinguishable from *Copeland v. Copeland*, 1998 WL 45445 (4th Cir. Feb. 6, 1998) (unpublished disposition), in which the Fourth Circuit affirmed a district court's discretionary exercise of *Colorado River* abstention in a Hague Convention suit. There, the state trial court had issued a final ruling denying the Hague Convention petition. Rather than appeal the state court ruling on the Hague Convention issue, the petitioner filed suit in federal district court, seeking to revive her ICARA and Hague Convention claims. In those circumstances, which differ sharply from those at bar, abstention would serve the interests of judicial economy.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

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| AMALIN HAZBUN ESCAF, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| v. | )Civil Action |
| | )No. 01-1926-A |
| | )(200 F. Supp 2d 603 |
| | ) E.D. Va 2002) |
| ISIDORO RODRIQUEZ, | ) |
| | ) |
| Respondent. | ) |

## FINAL JUDGMENT

The matter came before the Court for a bench trial on petitioner's complaint seeking the return of her son to Colombia, pursuant to the Hague Convention on the Civil Aspects of International Child Abduction[1] and the International Child Abduction Remedies Act[2]. After reviewing the testimonial and documentary evidence adduced by the parties, the Court issued findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. P. Based on those findings of fact and conclusions of law,

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[1]Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 1988 WL 411501 (entered into force Dec. 1, 1983; for the United States July 1, 1988; for Colombia March 1, 1996; between Colombia and the United States June 1, 1996).

[2]42 U.S.C. § 11601 *et seq.* The statute implements the Hague Convention in the United States and specifically states that its provisions "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C. § 11601(b)(2).

It is **ORDERED** that **JUDGMENT** be, and hereby is, entered in favor of petitioner and that the child, Isidoro Rodriguez Hazbun, be promptly returned to the custody of his mother in Barranquilla, Colombia.

It is further **ORDERED**, for the reasons stated from the bench, that respondent's motion for a stay pending appeal pursuant to Rule 62, Fed. R. Civ. P., is **GRANTED IN PART** and **DENIED IN PART**. It is granted insofar as this matter is stayed for the limited purpose of allowing respondent to seek a stay pending appeal from the Court of Appeals for the Fourth Circuit on an expedited basis. This stay is to remain in effect only until the Court of Appeals has ruled on respondent's expedited motion for a stay pending appeal. Respondent's motion for a stay is denied in all other respects.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
May 6, 2002

/s/
T.S. Ellis, III
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

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|---|---|---|
| AMALIN HAZBUN ESCAF, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civil Action No. 01-1926-A |
| | ) | |
| ISIDORO RODRIQUEZ[1], | ) | |
| | ) | |
| Respondent. | ) | |

## MEMORANDUM OPINION

Petitioner brought this action under the Hague Convention on the Civil Aspects of International Child Abduction[2] (Hague Convention) and the International Child Abduction Remedies Act[3]

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[1]The caption of the complaint lists respondent's name as "Rodriquez" with a "q" but all other pleadings spell the name "Rodriguez" with a "g". The more common "Rodriguez" spelling will be used here in all instances except in the caption.

[2]Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, 1988 WL 411501 (entered into force Dec. 1, 1983; for the United States July 1, 1988; for Colombia March 1, 1996; between Colombia and the United States June 1, 1996).

[3]42 U.S.C. § 11601 *et seq.* The statute implements the Hague Convention in the United States and specifically states that its provisions "are in addition to and not in lieu of the provisions of the Convention." 42 U.S.C. § I 1601(b)(2).

(ICARA) to secure the return of her son to Colombia from the keep of respondent, the child's father. Respondent moved to dismiss the petition (i) for lack of subject matter jurisdiction, pursuant to Rule 12(b)(l), Fed. R. Civ. P., (ii) for failure to join the child as an indispensable party, pursuant to Rules 12(b)(7) and 19, Fed. R. Civ. P., and (iii) for abstention pursuant to *Younger v. Harris,* 401 U.S. 37 (1971). The motion to dismiss was denied[4] and the matter set for a prompt trial.[5]

A bench trial was held on April 25 and May 1, 2002. Petitioner presented the testimony of one witness: Amalin Hazbun Escaf. Respondent presented the testimony of five witnesses: (1) Timothy Moore, chief executive officer of SOCOCO Construction who has lived in Colombia for approximately thirty-five years; (2) Derek Steele, teacher and counselor at Mark Twain Middle School; (3) Montgomery Blair Sibley, general manager of Alodus Corporation; (4) Irene Rodriguez, respondent's wife, who is a licensed Colombian attorney and who is employed as respondent's legal assistant; and (5) Isidoro Rodriguez Hazbun, the child whose return is being sought under the Convention.[6]

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[4] *See Hazbun Escafv. Rodriquez,* Civil No. 01-1926-A (E.D. Va. Mar. 19, 2002) (order); *Hazbun Escaf v. Rodriquez,* 191 F. Supp. 2d 685 (E.D. Va. 2002) (memorandum opinion).

[5] The Convention requires that judicial authorities "act expeditiously in proceedings for the return of children." Hague Convention art. 11.

[6] Isidoro, who celebrated his thirteenth birthday on March 10, 2002, was called to testify in this matter by his father, the respondent. To minimize any intimidation Isidoro might feel as a result of testifying in open court and to facilitate the Court's assessment of his maturity level, Isidoro's testimony was taken in chambers, on the record, with the parties and counsel present. In this environment, the Court interviewed Isidoro, asking him a number of questions about his life in Colombia and Virginia, as well

Also admitted into evidence were approximately thirty exhibits. The following findings of fact and conclusions of law are issued pursuant to Rule 52, Fed. R. Civ. P.

## FINDINGS OF FACT

1. Petitioner Amalin Hazbun Escaf(Hazbun) is a citizen of Colombia currently residing in Barranquilla, Colombia and employed as an optometrist.

2. Respondent Isidoro Rodriguez (Rodriguez) is a U.S. citizen currently residing in Fairfax County, Virginia. He is a member of the Virginia Bar and appears *pro per* in this matter.

3. Hazbun and Rodriguez were married in Colombia on August 6, 1988. They had a child, Isidoro Rodriguez Hazbun (Isidoro), on March 10, 1989. Isidoro was born in Barranquilla, Colombia, but is also a United States citizen by virtue of his father's citizenship. The family, including two of Hazbun's children from a previous marriage, lived together in Barranquilla for approximately seven years until 1996.

4. In the fall of 1996 Hazbun and Rodriguez separated, and in the spring of 1997 they divorced. Rodriguez continued to reside in Barranquilla until January 2000, when he came to reside full-time in Virginia. During the period of the separation and continuing through the time of the divorce, Isidoro resided with Hazbun in Barranquilla.

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as his concerns and preferences. Following this, the parties were given an opportunity to askIsidoro questions.

5. Rodriguez alleges that, coinciding with the separation, he and Hazbun arrived at a verbal agreement that they would share custody of their son such that Isidoro would divide his time equally between his parents. Hazbun testified, however, that there was no such agreement. There is no record evidence of the alleged agreement, and no court ever recognized this alleged agreement.

6. Then, in August 1997, the First Family Court of Barranquilla, Colombia approved a different custody agreement entered into by Hazbun and Rodriguez providing that Isidoro would reside with, and be primarily in the care of Hazbun, but would spend every other weekend with Rodriguez[7]. Pursuant to this court-approved custody agreement, the summer holidays were to be divided evenly with Isidoro spending equal time with each parent. The agreement also provided that both parents were to share the right and the responsibility for the education and the moral and intellectual upbringing of their child. In this regard, Rodriguez was to retain certain responsibilities for taking Isidoro to evening sports practices and academic lessons. In a second judicial order, the Barranquilla Family Court clarified that Hazbun retained formal custody of Isidoro.[8] The record reflects that both Hazbun and Rodriguez exercised their respective rights under the court-approved custody agreement.

7. Following the divorce, Isidoro continued to live with his mother in Barranquilla, where he continued as a student

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[7] *See Amalin Hazbun Escaf v. Isidoro Rodriguez Cruz* (First Family Court, Barranquilla, Colombia Aug. 1, 1997).

[8] *See Amalin Hazbun Escaf v. Isidoro Rodriguez Cruz*, Ref. No. 23.833 (First Family Court, Barranquilla, Colombia Aug. 26, 1997).

in good standing at Marymount School, a private, bilingual, Catholic school.[9] It is undisputed, and the record convincingly reflects that from birth to age twelve, Isidoro lived a full life as a young child growing up in Barranquilla; he participated in sports, had many friends, and maintained an active family and social life.

8. After Rodriguez moved to Virginia, Hazbun and Rodriguez agreed to have Isidoro travel to the United States to visit his father on three separate occasions. For Isidoro to travel outside Colombia, his parents had to provide Colombian authorities with notarized exit authority specifying Isidoro's departure and return dates. The first two visits were without incident: Isidoro visited his father in the United States during the summer of 2000 for one month and then again during Christmas vacation in 2000 for approximately two weeks. Isidoro's third trip to the United States was scheduled to commence on June 7, 2001 and conclude on July 14, 2001. Pursuant to the requisite notarized exit authority provided by Hazbun and Rodriguez, Isidoro traveled to the United States on June 7, 2001, using a ticket paid for by his father.

9. On July 13, 2001, one day before Isidoro's scheduled return to Colombia, Rodriguez sent a facsimile transmission to Hazbun in Colombia informing her that Isidoro would be remaining in the United States and would not be returning to Colombia as planned. Also included in the transmission were (i) a letter from Isidoro to his mother informing her that he wanted to stay with his

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[9]The record reflects that Isidoro's place at Marymount School has been reserved in his absence.

father,[10] and (ii) a copy of a petition for change of custody filed by Rodriguez in Isidoro's name in Fairfax County Juvenile and Domestic Relations Court.[11]

10. Consistent with the facsimile notice received by Hazbun, Isidoro did not return to Colombia. Instead, Isidoro has remained continuously in Virginia with his father since

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10 The Spanish original and an English translation of the July 13, 2001 letter were admitted into evidence. The translation of the letter admitted into evidence reads as follows:

> Hello mommy how are you? I hope OK. I write you to tell you that I want to stay here. I tell you this now from here, because you know that if I [told] you there yoou would not let me come.
>
> Mommy, I love you much and you know that I am always going to love you and to be your son, but now I want to spend time with my dad. Here everything is organized and I like the school its name is "Mark Twain Middle School". Besides I will improve my English and things are not so unsafe as in Colombia, neither there is guerrilla. Besides I am growing into a man and let's accept you are not [a] man. There are things I need to learn from him. I do not want this to turn into a fight you know that I hate when you fight. I am happy here, as I was when with you, but it is that here there are more opportunities in the study; besides I am getting [ready] for college. I know you love me and want the best for me and that I be happy, well this makes me happy. I love you much and I will miss you but so i miss my dad. I love you much and chachi and Mayri and I am going to miss you. Please let's talk every day.
>
> Thanks a very big kiss
> Isi
>
> (Errors in original)

11 *Isidoro Rodriguez-Hazbun v. Amalin Hazbun Escaf*, case No. JJ-347-050-01-01 (Juv. & dom. Rel. Ct. of Fairfax Cty., filed July 13, 2001).

June 7, 2001. During this period, Isidoro, a seventh grader, has attended the Mark Twain Middle School in Fairfax County, Virginia, where he participates in sports, has made new friends, and maintains an active social life. He has also maintained telephone contact with his mother and family in Barranquilla.

11 In sum, the record reflects that until his failure to return to Colombia on July 14, 2001, Isidoro had lived his entire life in Barranquilla, Colombia, making only occasional trips abroad.

1. On August 15, 2001, Hazbun filed a Hague Convention Return Application with the Colombian Central Authority,[12] seeking the return of Isidoro to Colombia.

2. On December 20, 2001, Hazbun filed this suit against Rodriguez seeking the return of Isidoro to Colombia under ICARA and the Hague convention.

3. At trial, Hazbun offered her own testimony, which credibly and convincingly established those matters set forth in paragraphs 1 through 13 above.

4. At trial, Rodriguez offered various exhibits and the testimony of witnesses in an attempt to show (i) that Isidoro would be in danger in Colombia, (ii) that Colombia's courts are corrupt and failed to provide due process, and (iii) that Isidoro is mature and wishes to remain in the United States.

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[12]Each nation that is a party to the Convention is required to designate a Central Authority to discharge the duties created by the Convention. *See* Hague Convention art. 6.

5. With respect to conditions in Colombia, there is no persuasive evidence of a serious risk of physical or psychological harm to Isidoro if he is returned to Colombia. At best, the record reflects a general current risk of harm to U.S. citizens in Colombia, but no specific risk of harm either to Isidoro or, more generally, to children in Barranquilla, Colombia who are Colombian as well as American citizens. Thus, the record contains a travel warning issued by the U.S. Department of State on April 17, 2001 advising U.S. citizens against travel to Colombia. The travel warning advised that U.S. citizens in Colombia are the victims of threats, kidnappings, domestic airline hijackings, and murders and that threats targeting U.S. citizens are expected to continue and possibly increase in response to U.S. support for Colombian drug eradication programs. The State Department further warned that nearly 120 U.S. citizens have been kidnapped in Colombia over the past 20 years. No information is provided concerning the age of the kidnapping victims.

6. Timothy Moore, a U.S. citizen who has lived in Colombia for approximately thirty-five years also offered testimony concerning conditions in Colombia. Moore is the chief executive officer of a heavy construction and mining company that has operated in Colombia since 1948 and uses Barranquilla as its principal base for Colombian maintenance facilities. Moore testified that he recently moved from Colombia to Miami for security reasons and, although his company formerly maintained a guest facility in Barranquilla for its visiting executives, these executives now, and for the past twelve months, have stayed instead in Barranquilla's principal hotel for reasons of security. Moore stated he has received kidnapping threats against himself and other employees, and that American employees of his company have been kidnapped when

working on a railroad construction project in northeastern Colombia near the Venezuelan border, a distance of more than 200 kilometers from Barranquilla. Moore now visits Colombia only for business and is accompanied by four bodyguards if he leaves the immediate area of Barranquilla.

7. Montgomery Blair Sibley, an American lawyer admitted to practice in several jurisdictions, testified that he has traveled to I3arranquilla about six times since 1990. Sibley was last in Colombia four years ago, but is now reluctant to return for reasons of personal safety. Sibley has seen Isidoro approximately once a month since Isidoro has been in the United States.[13]

8. Irene Rodriguez, respondent's legal assistant and a licensed Colombian attorney, worked for twelve years in respondent's law office. She was married to respondent in November 2000 and now resides with him in Virginia. Although a Colombian citizen, she is afraid to return to Colombia because of the situation there. She testified that, in 1997, Rodriguez was harassed by Colombian security officials and his office in Barranquilla was robbed. She further testified that, in February 2000, Rodriguez was threatened with kidnapping. Specifically, Irene Rodriguez testified that a notice posted on the outside door of Rodriguez's home in the Santa Veronica neighborhood of Barranquilla included a "kidnapping list" that named several persons. Rodriguez was not mentioned by name, but "the gringo" was mentioned on the list, which Irene

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[13]During these visits, Blair, it appears, had several conversations with Isidoro concerning Isidoro's wishes regarding returning to Colombia. Rodriguez was not permitted to elicit Blair's hearsay testimony concerning Isidoro's statements to him. *See* Rule 803, Fed. R. Evid.

Rodriguez and Rodriguez took to be a reference to Rodriguez.

9. Rodriguez genuinely fears for Isidoro's safety if Isidoro is returned to Colombia, partly because Rodriguez fears that his enemies might attempt to get to him through his son. Yet this fear has no persuasive record support. No threat has ever been directed to Isidoro and indeed, he lived in Barranquilla without incident for one and a half years after the threat Rodriguez believed was directed to him.[14] Moreover, Hazbun testified credibly that she is confident of her son's safety in Barranquilla. In this respect, she points out that Isidoro has many cousins and friends his age in Barranquilla, and there is no evidence that any of them have been threatened or harmed because of the political situation in Colombia.

10. At most, then, the evidence establishes (i) that Colombia may be a dangerous place for some American businessmen and (ii) that there has been a threat to Rodriguez in Barranquilla. There is no persuasive evidence specifically establishing a risk to Isidoro of kidnapping or violence in Barranquilla.[15]

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14 Furthermore, Isidoro did not live at the residence in Barranquilla where the kidnapping threat was posted, as he had resided with his mother since the 1996 separation.

15 An excluded exhibit (hearsay) indicates that in January 2002 there were 27 kidnappings of minors in Colombia as a whole, but this data was not broken down by geographic area, nor were the victims' nationalities specified. This exhibit separately reported that in January 2002 there was one kidnapping in the Colombian Province that includes the city of Barranquilla, but the victim's age and nationality were not specified. To put these figures in the proper perspective it is useful to note that Barranquilla is the fourth largest city in Colombia with a population of 1.3 million persons and that Colombia's total population is 43 million. Given this and

11. With respect to alleged corruption and lack of due process in the Barranquilla Family Court, the record contains documentary evidence of two petitions filed by Hazbun in Colombian Family Court for (i) an order increasing the monthly food allowance paid by Rodriguez to Hazbun for the maintenance of Isidoro, and (ii) an order requiring Rodriguez to pay past-due installments.

These petitions were apparently filed and ruled upon without providing Rodriguez with notice or opportunity for a hearing.[16]

12. With respect to Isidoro's maturity and adjustment to life in the United States, Rodriguez presented the testimony of Derek Steele, who is Isidoro's math teacher at Mark Twain Middle School. Steele testified that Isidoro is a bright young man who is different from the other boys his age in that he does not misbehave when the teacher leaves the classroom.

13. Finally, Rodriguez presented the testimony of Isidoro to establish the child's maturity and his desire to remain in the United States. In this regard, (i) Isidoro stated that he enjoyed his life in Barranquilla, but says he now prefers to stay in the United States so that he can live with his father for the time being. He indicated that he would

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given the lack of specificity, this exhibit, even assuming its admissibility, does not persuasively establish a serious risk of harm to Isidoro in Barranquilla.

[16]The petitions were dated July 2000 and April 2001, and the Family Court's order was issued April 25, 2001. All of this occurred after the August 1997 entry of the Barranquilla Family Court order approving the parties' custody agreement, as to which there is no allegation of lack of notice or opportunity to be heard.

prefer to spend alternate years with each of his parents. (ii) He also mentioned better job and educational opportunities as other reasons for staying in the United States. (iii) Finally, Isidoro indicated that he is concerned about violence in Colombia, although he has not received any personal threats and does not seem to fear for his own safety in Colombia. Isidoro testified that he has maintained regular contact with his mother and other friends and family in Colombia during his ten months in the United States.

14. It is apparent from his demeanor, his manner, and the nature of his testimony that Isidoro is a normal thirteen-year-old boy whose English is quite good, although not as good as his Spanish, which, for the first twelve years of his life, was his principal language. Isidoro exhibits a level of maturity commensurate with, but no greater than, the level of maturity reasonably expected of a typical boy his age. Thus, although his stated wish to remain with his father in the United States for the time being appears genuine,[17] his observations concerning jobs and opportunities in this country and the dangers in Colombia appear clearly to be the product of suggestion by others.

## CONCLUSIONS OF LAW

1 Hazbun filed this action pursuant to the Hague Convention[18], as implemented in the United States by

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17 *See supra* ¶ 24.

18 T.I.A.S. No. 11670

ICARA.[19] The Hague Convention establishes legal rights and procedures for the prompt return of children who have been "wrongfully removed to or retained in" a nation that is a party to the Convention. Hague Convention, art.1; 42 U.S.C. 11601(a). Through the adoption of the Convention, the signatory nations, including Colombia and the United States, sought "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, preamble. Thus, the primary purpose of the Convention is "to preserve the status quo" with respect to child custody and to deter feuding parents from "crossing international boundaries in search of a more sympathetic [custody] court." *Miller v. Miller*, 240 F. 3d 392, 398 (4th Cir. 2001).

2 The scope of a court's inquiry under the Convention is limited to the merits of the claim for wrongful removal or retention. *See* 42 U.S.C. §11601(b)(4); Hague Convention, art. 16. Accordingly, the merits of any underlying custody case are not at issue. *See Miller*, 240 F. 3d at 398; Hague Convention, art. 19.[20] Put differently, the focus of a court's inquiry in a Hague Convention case is not "the best interests of the child," as

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[19]42 U.S.C. §11601 *et seq.*

[20]Although some of the defenses to the return of a child under the Convention raise issues that may mirror those in a custody dispute, *see, e.g.*, Hague Convention, art. 13(b)(a court is not bound to order return if it would expose the child to grave risk of physical or psychological harm), the purpose of the Hague Convention proceeding is not to determine the best interests of the child, as is true in a custody dispute.

it typically is in a state custody case; rather it is the specific claims and defenses under the Convention, namely whether a child has been wrongfully removed to, or retained in, a country different from the child's habitual residence and, if so, whether any of the Convention's defenses apply to bar the child's return to his habitual residence.

3 ICARA, enacted in 1988, established procedures for the implementation of the Hague Convention in the United States. In this regard, it defined and allocated the burdens of proof for various claims and defenses under the Convention. *See* 42 U.S.C. § 11601 *et seq.*[21] Specifically, ICARA requires that a petitioner under the Hague Convention establish, by a preponderance of the evidence, that the child whose return is sought has been "wrongfully removed or retained within the meaning of the Convention." 42 U.S.C. § 1 1603(e)(1)(A). And, in this respect, the Convention reflects "a strong presumption favoring return of a wrongfully removed child." *Danaipour v. McLarey,* 286 F.3d 1, 13 (1st Cir. 2002). If a petitioner establishes by a preponderance of the evidence that a respondent's retention of a child was wrongful within the meaning of the Convention, the child's return is required unless the respondent can establish one of the Convention's five available defenses.[22]

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Cases brought pursuant to ICARA and the Hague Convention are tried to a judge, as neither ICARA nor the Hague Convention provides for trialby jury and the available remedy--return of the child--is equitable in nature. *See Silverman v. Silverman,* 2002 WL 264932 (D. Minn. Feb. 21, 2002).

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*See* 42 U.S.C. § 11603(e)(2)(A) (requiring proof, by clear and convincing evidence, that one of the defenses ,set forth in article 13b or 20

And significantly, these defenses to a child's return are to be construed narrowly.[23] Indeed, a court retains discretion to order a child's return even if one of the defenses is proven. *Miller,* 240 F.3d at 402 (citing Pub. Notice *957,* 51 Fed. Reg. 10,494, 10,509 (1986)).[24]

4. Thus, to establish in this matter that Isidoro was wrongfully retained in the United States, Hazbun must prove by a preponderance of the evidence (i) that Isidoro was habitually resident in Colombia at the time Rodriguez retained Isidoro in the United States; (ii) that the retention was in breach of Hazbun's custody rights under Colombian law; and (iii) that she had been exercising those custody rights at the time of retention, or would have been exercising them but for the retention. *See Miller,* 240 F.3d at 398; Hague Convention, art. 3. Hazbun has met her burden; the record convincingly confirms that Isidoro was wrongfully retained by Rodriguez within the meaning of the Convention.

5. Although the Convention does not define "habitual residence," the Fourth Circuit has determined that

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of the Hague Convention applies); 42 U.S.C. § 1 1603(e)(2)(B) (requiring proof, by a preponderance of the evidence, that some other defense set forth in article 12 or 13 of the Hague Convention applies).

[23]*See* 42 U.S.C. § 1 160 1(a)(4); *Miller,* 240 F.3d at 402; *Feder v. Evans-Feder,* 63 F.3d 217, 226 (3d Cir. 1995); *Rydder v. Rydder,* 49 F.3d 369 (8th Cir. 1995).

[24]*See also* Hague Convention, art. 13 ("the judicial. . . authority is not bound to order the return of the child if. . . ."); Hague Convention, art. 20 ("return of the child under the provisions of Article 12 *maybe refused* if. . . .").

> there is no real distinction between ordinary residence and habitual residence. . . . A person can have only one habitual residence. On its face, habitual residence pertains to customary residence prior to the . The court must look back in time, not forward.[25]

It is also clear that the parents' citizenship and residence and the child's citizenship are not determinative of the child's habitual residence.[26] The habitual-residence inquiry is fact-specific and should be made on a case-by-case basis. *See Miller,* 240 F.3d at 400. And importantly, a parent cannot create a new habitual residence by wrongfully retaining a child.[27] In cases where a child's initial translocation from an established habitual residence is clearly intended to be of a specific duration (such as a defined visit to see the father during summer vacation), courts have generally refused to find that the changed intentions of one parent can operate to alter the child's

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*Miller,* 240 F.3d at 400 (citing *Friedrich v. Friedrich,* 983 F.2d 1396, 1401 (6th Cir.1993) (hereinafter *Friedrich I*)).

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*See Diorinou v. Mezitis,* 237 F.3d 133 (2nd Cir. 2001) (finding that children were habitually resident in Greece where children were citizens of both the United States and Greece, the father was a U.S. citizen, and the mother was a Greek citizen); *March v. Levine,* 249 F.3d 462 (6th Cir. 2001) (finding that children were habitually resident in Mexico where the children, both United States citizens, had been living in Mexico with their American father for one year prior to being removed to the United States by their maternal grandparents).

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*See Miller,* 240 F.3d at 400; *Diorinou* 237 F.3d at 141-42.

habitual residence.[28]

6. In the instant case, the credible record evidence compels the conclusion that Isidoro was habitually resident in Colombia immediately prior to his retention in the United States. This follows chiefly from the undisputed fact that prior to remaining in the United States in July 2001, Isidoro had lived his entire life in Barranquilla, Colombia. From birth until his parents' separation and divorce, Isidoro lived with his parents in Barranquilla, Colombia. Following his parents' separation in 1996, Isidoro lived with his mother in Barranquilla, attended school there, and had (and continues to have) numerous friends and family in Barranquilla.

7. As the custody agreement approved by the Colombian Family Court gave formal custody to Hazbun, with only visitation rights for Rodriguez, it is clear by a preponderance of the evidence that Rodriguez's retention of Isidoro for the last nine to ten months is in violation of Hazbun's custody rights under Colombian law. In this respect, whether a parent was exercising lawful custody of a child at the time of retention must be determined under the law of the child's habitual residence. *Miller*, 240 F.3d at 402; *Friedrich I*, 983 F.2d at 1042. What it means for a parent to exercise custody rights should be construed liberally. As the Sixth Circuit noted,

> The only acceptable solution, in the absence of a ruling from a court in the country of habitual residence, is to liberally find 'exercise' whenever a parent with de jure custody rights keeps, or

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[28] *See Mozes v. Mozes*, 239 F.3d 1067, 1077 (9th Cir. 2001) (Kozinski, J.) (citing and interpreting cases).

seeks to keep, any sort of regular contact with his or her child.

*Friedrich v. Friedrich*, 78 F.3d 1060, 1065 (6th Cir. 1996) (hereinafter *Friedrich II)*. Thus, the Sixth Circuit concluded, a person with valid custody rights to a child under the law of the country of the child's habitual residence does not fail to exercise those custody rights under the Hague Convention "short of acts that constitute clear and unequivocal abandonment of the child." *Id.* Here, there is not a scintilla of evidence of such abandonment; to the contrary, the record clearly reflects that Hazbun was exercising her lawful custody rights immediately prior to Rodriguez's retention of Isidoro in the United States. She granted permission for Isidoro to *visit* his father in the United States for a brief period; she did not abandon her child, nor did she consent to his retention in the United States. Instead, she has promptly and steadfastly objected to the retention and vigorously pursued steps to compel the child's return to Colombia.

8. In sum, a preponderance of the record evidence convincingly establishes all three elements required under the Convention to prove that Isidoro was wrongfully retained in the United States. Because Rodriguez's retention of Isidoro in the United States was wrongful within the meaning of the Convention, Isidoro's return to Colombia is required under the Convention unless Rodriguez can establish one of the five available defenses.

9. To establish on the defenses, Rodriguez must prove

1. by clear and convincing evidence that there is a grave risk that returning Isidoro to Hazbun in Colombia would expose the child to physical or psychological harm or otherwise place him in an

intolerable situation;[29]

2. by clear and convincing evidence that the return of Isidoro to Colombia would not be permitted by the fundamental principles of the United States "relating to the protection of human rights and fundamental freedoms";[30]
3. by a preponderance of the evidence that Hazbun's action for return was not commenced within one year of the wrongful retention *and* that Isidoro is not well-settled in Virginia;[31]
4. by a preponderance of the evidence that Hazbun "was not actually exercising the custody rights at the time of. . . retention. . . or had consented to or subsequently acquiesced in the. . . retention";[32] or by a preponderance of the evidence that Isidoro "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of views."[33]

Rodriguez does not assert or rely on defenses (iii) and

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[29]42 U.S.C. § 1 1603(e)(2)(A); Hague Convention, art. 13b.

[30]42 U.S.C. § 1 1603(e)(2)(A); Hague Convention, art. 20.

[31]42 U.S.C. § 1 1603(e)(2)(B); Hague Convention art. 12.

[32]42 U.S.C. § 1 1603(e)(2)(B); Hague Convention, art. 13a.

[33]42 U.S.C. § 1 1603(e)(2)(B); Hague Convention, art. 13 ¶2.

(iv).[34] His contentions concerning the remaining defenses are separately addressed.

10. Courts examining the Article 13b exception for grave risk of harm to the child generally look to the risk of physical or psychological harm that might be inflicted on the child by the person to whose custody the child would be returning.[35] This provision of the Convention "was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests." *Friedrich II*, 78 F.3d at 1068. Accordingly,

> [o]nly evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination. The person opposing the child's return must show that the risk to the child is grave, not merely serious.

*Id.* No such showing has been made in this case.

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[34] The Article 12 exception is inapplicable. Hazbun's Hague Convention petition and this suit were filed well within one year of the wrongful retention. And, with respect to the Article 1 3a exception, there is no contention that Hazbun was not exercising her custody rights under the court-approved custody agreement.

[35] *See, e.g., Miller*, 240 F.3d at 402 (finding no evidence that the mother would pose a danger to her children); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374 (8th Cir. 1995) (finding that allegations that the mother was physically, sexually, and mentally abused by the father and that the mother feared for the safety of the child were too general to establish an exception); *Blondin v. Dubois*, 189 F.3d 240, 247 (2nd Cir. 1999) (refusing to return a child to France because she faced a grave risk of physical abuse from her father there).

11. While there is evidence that American businessmen face a heightened risk of kidnapping and violence and that Rodriguez himself has been threatened, there is no clear and convincing evidence of serious danger in Barranquilla to a thirteen-year old Colombian national who also holds U.S. citizenship and who lives there with his Colombian mother and family. There is no evidence that Isidoro's return would subject him to a *grave* risk of physical or psychological harm or otherwise place him in an intolerable situation. To the contrary, there is evidence that Isidoro's family and other relatives live safely in Barranquilla and that Isidoro, on his return, would be able to resume his habitual residence, enjoy his friends and family, and return to the school where he was previously enrolled.

12. Rodriguez's reliance on Article 20 to bar Isidoro's return to Colombia is unpersuasive. The parties have not cited, nor has the Court found, any authority applying the Article 20 exception to return based on "fundamental principles of the [United States] relating to the protection of human rights and fundamental freedoms." This seldom-cited[36] and somewhat obscure provision[37] was adopted

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[36]As of 1997 the Article 20 defense had successfully been invoked only twice internationally—in cases where the constitutionality of the Convention itself was challenged—and not at all in the United States. *See* Report of the Third Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (17—2 1 March 1997), Permanent Bureau of the Hague Conference on Private International Law ¶ 78 (1997).

[37]One commentator notes that Article 20 has "nearly faded without a trace." Beaumont, P.R. & McEleavy, P.E., The Hague Convention on International Child Abduction 172 (1999). This may be because Article 20

as a compromise between those countries that wanted a public policy exception in the Convention and those that did not.[38] It was meant to be "restrictively interpreted and applied. . . on the rare occasion that return of a child would utterly shock the conscience of the court or offend all notions of due process."[39] There is no record evidence that approaches this threshold. Thus, Article 20 has no application here.[40]

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P.E., The Hague Convention on International Child Abduction 172 (1999). This may be because Article 20 and Article 13b appear to be redundant. If the return of a child would violate fundamental U.S. principles relating to human rights, it would also involve returning him to an intolerable situation.

38 Department of State, Hague International Child Abduction Convention; Text and Legal Analysis, Pub. Notice 957, 51 Fed. Reg. 10,494, 10,510 (1986) (hereinafter "State Department Legal Analysis"). This legal analysis of the Hague Convention prepared by the State Department was provided to the Senate Committee on Foreign Relations to assist that Committee and the full Senate in their consideration of the Convention prior to ratification.

39 State Department Legal Analysis at 10,510.

40 Rodriguez argued that he was denied due process in the Colombian courts when the Barranquilla Family Court decreed the custody arrangement between him and his former wife and later ordered increases in support payments without notice. He also argued that the Barranquilla Family Court did not respect the wishes of Isidoro with respect to custody. These arguments are factually and legally flawed. Article 20 does not contemplate that courts applying the provision must compare the due process safeguards provided in the petitioner's country with those pitvided in the respondent's country or with some ideal notion of due process. *See* State Department Legal Analysis at 10,511. Further, the facts disclose no violations of Rodriguez's or Isidoro's due process rights in connection with the custody determination, which is reflected in the court-approved agreement. That Rodriguez may have been denied notice and opportunity for

13. The final exception, found in Article 13 ¶ 2, allows a court to decline to return a child when the child objects to being returned and is of sufficient age and maturity such that his views may be considered. This "age and maturity" defense, like the others, is to be narrowly construed. *See England v. England,* 234 F.3d 268, 272 (5th Cir. 2000). Both the maturity and the child's objection must be proved by a preponderance of the evidence.[41] The discretionary aspect of this defense is important because of the potential for undue influence by the person who allegedly wrongfully retained the child.[42]

14. Isidoro is a normal child of thirteen who seems to be coping well with an exceptionally difficult situation. Yet, he is certainly not mature nor sophisticated beyond his years, and, like all adolescents, he is susceptible to suggestion and manipulation. Indeed, some of his

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a hearing with respect to later orders for increases in child support has no bearing on a determination under the Hague Convention whether the child's return would violate fundamental principles of the United States relating to the protection of human rights and fundamental freedoms.

[41]*See id.* (reversing a district court and finding that a 13-year old who had four mothers in twelve years, had been diagnosed with Attention Deficit Disorder, had learning disabilities, took Ritalin regularly, and was scared and confused by the circumstances producing the litigation was not sufficiently mature to meet the standard—but, significantly, *not* finding that a 13-year old is not sufficiently mature as a matter of law)

[42]*See* Pub. Notice 957, 51 Fed. Reg. 10,494, 10,509 (1986) ("As with the other Article 13 exceptions to the return pbligation, the application of this exception is not mandatory. . . . A child's objection to being returned may be accorded little if any weight if the court believes that the child's preference is the product of the abductor parent's undue influence over the child.").

statements regarding reasons for staying in the United States appear to be the product of suggestion, echoing the preferences of his father. Isidoro does not have a strong objection to returning to Colombia, as he has little or no fear for his personal safety and has no objection to living with his mother. His stated preference is to remain in the United States for now to spend more time with his father, but then to spend equal time in the United States and Colombia. To accommodate Isidoro's preference would be a custody determination that is not at issue in a Hague Convention petition. Because Isidoro is not exceptionally mature and does not object strongly to returning to Colombia, the Article 13 ¶ 2 exception has not been established.

15. Under these circumstances, where Isidoro has been wrongfully retained in the United States and none of the available exceptions have been established, ICARA and the Hague Convention require Isidoro's return to Colombia "forthwith."[43] An appropriate order will issue.

Alexandria, Virginia
May 6, 2002

/s/
T.S. Ellis, III
United States District Judge

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[43] Hague Convention art. 12.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

| | | |
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| AMALIN HAZBUN ESCAF, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civil Action No 01-1926-A |
| | ) | |
| ISIDORO RODRIQUEZ, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER**

By Order dated May 6, 2002, the Court granted judgment in favor of petitioner and ordered that the minor child Isidoro Rodriguez Hazbun be promptly returned to the custody of petitioner, the child's mother, in Barranquilla, Colombia. The Court granted a temporary stay of its Order for the limited purpose of allowing respondent to seek a stay pending appeal from the United States Court of Appeals for the Fourth Circuit. The stay was to remain in effect only until the Court of Appeals ruled on respondent's expedited motion for a stay pending appeal. On May 22, 2002, the Fourth Circuit denied respondent's request for a stay. On May 24, 2002, the Fourth Circuit stayed this Court's May 6, 2002 Order, and its own May 22, 2002 Order in light of respondent's filing of an application for a stay with the United States Supreme Court. The Fourth Circuit's stay was to remain in effect until such tune as the Supreme Court acted on the matter. On May 29, 2002, Chief Justice Rehnquist denied respondent's application for stay of enforcement of judgment pending expedited appeal, and on May 31, 2002, the Fourth Circuit issued an Order clarifying that its stay, issued May 24, 2002, had no further effect. Also on May 31, 2002, respondent renewed his application to the

United States Supreme Court for a stay of this Court's May 6, 2002 Order pending expedited appeal. Respondent's application was addressed to Justice O'Connor, who referred it to the full Supreme Court.

On June 7, 2002, this Court held a hearing in the matter and, as there was no stay then in effect, issued an Order directing respondent to transfer physical custody of the child to petitioner immediately. The Order also directed petitioner and the child to remain in the United States pending further Order of the Court.

On June 10, 2002, the United States Supreme Court denied respondent's second application for a stay of this Court's May 6, 2002 Order.

Accordingly, and for good cause,

It is **ORDERED** that the travel restriction imposed on petitioner and the child by the Court's Order of June 7,2002 is **REMOVED.**

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
June 10, 2002

/s/
T.S. Ellis, III
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Alexandria Division**

| | | |
|---|---|---|
| AMALIN HAZBUN ESCAF, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civil Action No. 01-1926-A |
| | ) | |
| ISIDORO RODRIQUEZ, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER**

The matter comes before the Court on respondent's motion for a three-day stay pending decision of the United States Court on June 10, 2002, at 10:00 a.m, regarding respondent's emergency application for a stay of this Court's May 6, 2002 Order pending appeal. Respondent's application for a stay has already been denied by the United States court of Appeals for the Fourth Circuit and by Chief Justice Rehnquist. The Court is advised that respondent has petitioned Justice O'Connor to enter a stay, but no decision has issued. Thus, there is currently no stay of the Court's May 6, 2002 Order in effect from either the Fourth Circuit or the Supreme Court. Accordingly, and for the reasons stated in denying respondent's original motion for a stay pending appeal,

It is **ORDERED** that respondent's motion for a three-day stay in **DENIED**.

It is further **ORDERED**, however, that respondent **APPEAR** at2:00 p.m., Friday, June 7, 2002, and **PRODUCE** the minor child, Isidoro Rodriguez Cruz, at which time the Court will determine:

(i) Whether there is to be an immediate transfer of custody of the child to petitioner and, if so, whether petitioner should be ordered to remain with the child in the United States until 12:00 p.m., Monday, June 10, 2002, at which time it is anticipated that an order of Justice O'Connor or the Supreme Court will have issued; or

(ii) whether the transfer of custody should be delayed until 12:00 p.m., Monday, June 10, 2002, pending issuance of any order by Justice O'Connor or the Supreme Court.

The Clerk is directed to send a copy of this Order to all counsel of record.

Alexandria, Virginia
June 6, 2002

/s/
T.S. Ellis, III
United States District Judge

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**AlexandriaDivision**

| | | |
|---|---|---|
| AMALIN HAZBUN ESCAF, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Civil Action No. 01-1926-A |
| | ) | |
| ISIDORO RODRIQUEZ, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER**

The Court has received letters dated June 3, 2002 from both petitioner and respondent.[1] Petitioner's letter requests the entry of an Order directing the arrest and return of the minor child Isidoro Rodriguez Hazbun to effectuate this Court's Order of May 6, 2002. Respondent's letter requests that this Court refrain from further action pending additional appellate review. No formal motions have been filed by either petitioner or respondent.

On May 6, 2002, this Court entered an Order[2] granting judgment in favor of petitioner and ordering that the minor child Isidoro Rodriguez Hazbun be promptly returned to the custody of his mother in Barranquilla, Colombia. The Court granted a temporary stay of its Order for the limited purpose of allowing

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[1]In the future, all communications by the parties with the Court should be via proper motions or pleadings, not letters.

[2]*Hazbun Escaf v. Rodriquez*, Civ. No. 01-1926-A (E.D. Va. May 6, 2002) (judgment order).

respondent to seek a stay pending appeal from the United States Court of Appeals for the Fourth Circuit The stay was to remain in effect only until the Court of Appeals ruled on respondent's expedited motion for a stay pending appeal. On May 22, 2002, the Fourth Circuit denied respondent's request for a stay.[3] On May 24, 2002, the Fourth Circuit stayed this Court's May 6, 2002 Order, and its own May 22, 2002 Order in light of respondent's filing of an application for a stay with the United States Supreme Court.[4] The Fourth Circuit's stay was to remain in effect until such time as the Supreme Court acted on the matter. On May 29, 2002, Chief Justice Rehnquist denied respondent's application for stay of enforcement of judgment pending expedited appeal.[5] On May 31, 2002, the Fourth Circuit issued an Order clarifying that its stay, issued May 24, 2002, had no further effect and directing petitioner to present her motion for an order directing the arrest and return of her minor child to this Court.[6] Also on May 31, 2002, respondent renewed his application to the United States Supreme Court for a stay of this Court's May 6, 2002 Order pending expedited appeal, which application is currently scheduled

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3 *Hazbun Escaf v. Rodriguez*, No. 02-1487 (4th Cir. May 22, 2002) (order).

4 *Hazbun* Escaf v. Rodriguez, No. 02-1487 (4th Cir. May 24, 2002) (order).

5 *Rodriguez v. Hazbun Escaf*, App. No. 01A930 (U.S. May 29, 2002) (letter from William K. Suter, Clerk of the Court).

6 *Hazbun Escaf v. Rodriguez*, No. 02-1487 (4th Cir. May 31, 2002) (order).

for the Supreme Court's June 6, 2002 Conference.[7] On June 3, 2002, respondent petitioned the Fourth Circuit for a rehearing en banc of the panel's decision to deny his motion for a stay pending appeal.

As a result, there is currently no stay of this Court's May 6, 2002 Order, which remains in full effect and obligates respondent promptly to return the child Isidoro Rodriguez Hazbun to the custody of petitioner. To the extent that respondent's June 3, 2002 letter asks the Court to refrain from further action pending additional appellate review, that letter is appropriately construed as a renewal of respondent's motion for a stay of the Court's May 6, 2002 Order. Because there is no good cause for granting a stay,

It is **ORDERED** that respondent's renewed motion for a stay of the Court's May 6, 2002 Order is **DENIED.**

It is further **ORDERED** that respondent, on or before 2:00 p.m., Friday, June 7, 2002, **DELIVER** the minor child, Isidoro Rodriguez Hazbun, to the child's mother, petitioner Amalin Hazbun Escaf, so that she may return to Colombia with the child.

It is further **ORDERED** that the delivery of custody of the minor child shall occur at Courtroom 801 of the Albert V. Bryan U.S. Courthouse in Alexandria, Virginia or at such other place mutually agreed by the parties.

It is further **ORDERED** that should the transfer not occur by 2:00 p.m., Friday, June 7, 2002, respondent must **APPEAR** before the Court at 2:00 p.m., Friday, June 7, 2002, and **SHOW**

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[7] In the event the United States Supreme Court stays the Court's May 6, 2002 Order, this Order, of course, is also stayed.

**CAUSE** why he should not be held in contempt for failure to comply with the Court's Orders.

The United States Marshal is directed to serve a copy of this Order on counsel for the petitioner, Patrick H. Stiehm, at 4308 Lawrence Street, Alexandria, Virginia 22309; and on the respondent, Isidoro Rodriguez, at ~~4304~~ 2304 Farrington Avenue, Alexandria, Virginia 22303.

Alexandria, Virginia
June 5, 2002

/s/_____
T.S. Ellis, III
United States District Judge

***THE RODRIGUEZ LAW FIRM***
***ATTORNEYS AND COUNSELORS AT LAW***

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World Trade Centre-Barranquilla
Calle 76 No. 54-11, Office 313
Barranquilla, Colombia
011.575.3480001

May 9, 2002

Ms. Barbara Rowe and/or
Mr. Mike Randy, Office of the Clerk
United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

RE: **Rule 44 Notice of Case Involving Constitutional Question Where United States is Not a Party, *Amalin Hazbun Escaf vs. Isidoro Rodriguez*, E.D. VA No. 01-1926-A; Ct. App. No. 02-1487.**

Greetings:

This will confirm my telephone conversations in which I requested the Clerk's Office of the United States District Court for the Eastern District of Virginia to send you by facsimile a copy of the Notice of Appeal filed May 7, 2002 in the above-referenced case.

Enclosed are an original and three copies of Respondent-

Appellant's Expedited Motion for Stay of Judgment Pending Appeal and an original and three copies of a Request for Judicial Notice by the Court of Appeals of the physical dangers and "zone of war" to Americans presently existing throughout the Republic of Colombia.

First, before the court below, Respondent-Appellant raised as an affirmative defense that the application of the Hague Convention on the Civil Aspects of International Child Abduction dated October 25, 1980 (the "Hague Convention"), and the International Child Abduction Remedies Act, 42 U.S.C. section 11601 *et seq.* ("ICARA"), would violate Respondent-Appellant's and his son's fundamental Constitutional rights. The decision of the court below orders Respondent-Appellant, a United States citizen, to return his thirteen-year-old son (who is also a United States citizen) to Barranquilla, Columbia over his son's objections, and in the face of grave physical danger to American citizens in Columbia.

Second, Federal courts have recognized that since FY 2000, recent concerns by litigants and witnesses for their physical safety in the expanded "zone of war" in Columbia "appear highly relevant to the balancing inquiry that the District Court must conduct" in deciding a motion to dismiss for *forum non conveniens*. *Iragorri v. United Technologies Corp. and Otis Elevator Co.*, 274 F.3d 65, 75 (2nd Cir. 2001) (*en banc*). *See also In re: Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, Order Denying Defendant Ford and Firestone's Motions to Dismiss Columbian and Venezuelan Cases on Ground of *Forum Non Conveniens* at 31-33, J.P.M.L. No. 1373 (S.D. Ind. Mar. 25, 2002), in which the court took judicial notice of United States Department of State announcements, news articles and Internet web sites concerning the recent increased dangers in Columbia. Consistent with these judicial precedents, Respondent-Appellant's present Request for Judicial Notice asks the Court of Appeals to reach the same result here.

In summary, in addition to the relevant exceptions under Art. 13b, Art. 13¶4, and Art. 20., of the Hague Convention and ICARA, the decision of the court below violates the fundamental U.S. Constitutional rights of Respondent-Appellant and his son as a United States citizen to live and stay in the United States during this period of expanded civil war in Colombia, as well as Respondent-Appellant's and his son's fundamental Constitutional and Due Process rights as a parent to rear his son as a U.S. citizen, and the right to maintain and protect the basic father/son relationship. *See Troxel v. Granville*, 530 U.S. 57, __ (2000) (plurality opinion), describing the interest of parents in the care, custody, and control of their children as "perhaps the oldest of the fundamental liberty interests recognized by this Court."

In closing, I thank you for your prompt attention to my request to have my appeal docketed, and to supply me with the appropriate assigned Docket Number 02-1487.

Very truly yours,

Isidoro Rodriguez, Esq.

Enclosure

cc: President George W. Bush, The White House
Attorney General John D. Achcroft, U.S. Dept of Justice
Mr. Paul J. McNulty, U.S. Attorney, E.D. Va.
Mr. Patrick H.Stiehm

***THE RODRIGUEZ LAW FIRM***
***ATTORNEYS AND COUNSELORS AT LAW***

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August 20, 2002

Ms. Barbara Rowe, Office of the Clerk
United States Court of Appeals for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517 (804)916-2737

RE: ***Amalin Hazbun Escaf vs. Isidoro Rodriguez*, E.D. VA No. 01-1926-A; Ct. App. No. 02-1487**.

Greetings:

Pursuant to my letter dated May 9, 2002 (copy attached), issued under FRAP Rule 44, wherein I gave notice to your office of my Constitutional challenge to the Hague Convention as applied, your office was to "certify such fact to the Attorney General." Although the Constitutional question was raised as a challenge to the order of Hon. Judge T.S. Ellis, III, in various pleadings and in the Docketing Statement, to date the Pacer System does not reflect that the Clerk's Office has complied with Rule 44.

Given that the Court Reporter of the Hon. Judge T.S. Ellis III's caused a delay of over 90 days by not complying with my Transcript Order of May 7, 2002, I seek to further delay of this appeal, thus please advise the Attorney General as required under FRAP Rule 44. In closing, I confirm again that I will be personally hand-delivering for filing Appellant's Brief and the Joint Appendix on Friday, August 23, 2002. I hope we have an opportunity to meet.

Very truly yours,

Isidoro Rodriguez, Esq.

Enclosure

cc: Mr. Patrick H.Stiehm (703)935-8266
Mr. Lawrence J. Leiser (703)299-3983

**U.S. Department of Justice**
**Civil Division**

MJS:HSScher:lcb

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August 29, 2002

Patricia S. Connor
Clerk, United States Court of Appeals
for the Fourth Circuit
1100 East Main Street
5th Floor, Suite 501
Richmond, VA 23219-3517

Re: Escaf v. Rodriguez. No. 02-1487 (4th Cir.)

Dear Ms. Connor:

This letter is written in response to the Court's letter of August 20, 2002, informing the Department of Justice of appellant's intention to challenge the constitutionality of a federal statute in the above-referenced case. We have now received a copy of appellant's brief in which the constitutional issue is raised and are in the, process of consulting with the Department of State and other interested components with respect to that challenge to determine whether to seek authorization from the Solicitor General to intervene or otherwise participate in this appeal (see 28 C.F.R. 0.20(c)). At this time, we are unable to state whether the government intends to file a brief, especially given the expedited briefing schedule established in this case. Nevertheless, we appreciate your having called this matter to our attention and will advise the Court as soon as possible if the government concludes that participation is appropriate.

Sincerely,

/s/_____
MICHAEL JAY SINGER
HOWARD S. SCHER
Attorneys, Appellate Staff
Civil Division, Room 9116
601 "D" Street, N.W.
Washington, D.C. 20530-0001

COMMONWEALTH OF VIRGINIA:
IN THE JUVENILE AND DOMESTIC RELATIONS
COURT OF THE COUNTY OF FAIRFAX

Master Isidoro Rodriguez-Hazbun,
Petitioner,

v.

Case No. JJ-347-050-01-01
ChiefJudge David Schell

Ms. Amalin Hazbun Escaf,
Respondent.

**PETITION TO MODIFY AND AMEND CUSTODY AGREEMENT BASED ON MATERIAL CHANGE OF CIRCUMSTANCE AND IN THE BEST INTEREST OF MINOR CHILD PETITIONER**

TO: Ms. Amalin Hazbun Escaf
Kra. 55 No.80–158
Barranquilla, Colombia
Telephone: 011-5753-583958

Petitioner, Master Isidoro Rodriguez-Hazbun, respectfully represents the following in support of his Petition, pursuant to Va. Code § 20-124.3(7) and (8), the precedents in *Haase v. Haase*, 20 Va. App. 671, 460 S.E. 2d 585 (1995), as well as *Keel v. Keel*, 225 Va. 606 (1983), and his fundamental right as a United States citizen, to request the Court to modify the custody agreement between his parents, to order that he not be required to return to the Republic of Colombia due to civil unrest, physical danger, and limited educational opportunity, and to order the modification of the custo ly agreement between his parents to direct that he stay in the United States in the sole custody of his father, Mr. Isidoro Rodriguez, Esq. as defined under 20 Va. Code § 124.1, and grant

other relief the Court deems appropriate:

1. Petitioner, Master Isidoro Rodriguez-Hazbun (Petitioner), is a United States Citizen of twelve years, four months of age, with Social Security No. 213-55-7508, and United States Passport Number 701466034 (Petitioner Exhibit 1).

2. Petitioner, Master Isidoro Rodriguez-Hazbun, is domiciled and resides at 2059 Huntington Avenue, Suite 1600, Alexandria, with his father, Mr. Isidoro Rodriguez, Esq., a United States Citizen, a resident of the Commonwealth of Virginia since 1979, and an active Member of the State of Virginia Bar No. 21573.[1] Petitioner Master Isidoro Rodriguez-Hazbun's father Mr. Isidoro Rodriguez, Esq., has at all times been a nurturing father who has bonded and cared for the child of the parties, taking Petitioner both on annual vacations to the United States, and business travel to view numerous *pro hoc vice* civil actions in various Court's in the United States.

3. Respondent, Ms. Amalin Hazbun Escaf, is a citizen of the Republic of Colombia, is Petitioner's mother, and resides at Kra. 55 No.80–158, Barranquilla, Colombia.

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[1]After leaving a SES White House appointment as Director of the Office of Civil Rights, USDA in the first Reagan/Bush Administration, Mr. Isidoro Rodriguez, Esq., has for the past 18 years maintained and marketed his professional services as a Virginia attorney with an international law practice from Alexandria, Virginia. In 1983, he was Assistant General Counsel/Contracts Administrator on a $2 Billion EXXON mega-coal project in the Republic of Colombia. In 1987, the U.S. Embassy requested that he consider representing a group of U.S. citizens who are the finders and claimants of fourteen treasure ship targets located off the coast of the Republic of Colombia valued at $1.5 to $10 Billion USD. In 1989, a breach of contracts suit was filed against the Republic of Colombia, *Sea Search Armada vs. President of the Republic of Colombia*, Superior Tribunal Judicial District of Barranquilla, Rad. No. 20-166. This case has been described by Members of the U.S. Congress as the "largest private claim by American citizens against a foreign state pending in the world," (Letter from Congressmen Gilman, Burton and Crane to former Secretary of State Warren M. Christopher). Mr. Isidoro Rodriguez Esq. Virginia Attorney's Lien is 10% of the value of the fourteen targets.

Respondent, Ms. Amalin Hazbun Escaf, is a licensed optometrist, with two successful retail/offices in Barranquilla, Colombia.

4. Mr. Isidoro Rodriguez, Esq., and Respondent Ms. Amalin Hazbun Escaf, were married August 2, 1988, in the jurisdiction of Barranquilla, Republic of Colombia.

5. There was one child born of this marriage, namely, Petitioner Master Isidoro Rodriguez-Hazbun, born on March 10, 1989.

6. As a result of cultural differences which could not be resolved after consultations with five different family psychologists, during the period of 1988 to 1995, and after a one year informal separation in 1995, Mr. Isidoro Rodriguez, Esq., and Respondent Ms. Amalin Hazbun Escaf, in the Summer of 1996 verbally agreed to legal separation, divorce, to divided custody of Petitioner Master Isidoro Rodriguez-Hazbun based on Petitioner best interests, and to not interfere in any manner with said divided custody arrangement. *See Mullen v. Mullen*, 188 Va. 259, 49 S.E.2d 349 (1948); *see also Brooks v. Brooks,* 201 Va. 731, 113 S.E.2d 872 (1960); *Andrews v. Geyer*, 200 Va. 107, 104 S.e.2d 747 (1958).

7. Mr. Isidoro Rodriguez, Esq., and Respondent Ms. Amalin Hazbun Escaf last cohabited until September 30, 1996, at Kra. 55 No.80–158, Barranquilla, in the Republic of Colombia, and were legally divorced in Barranquilla, Colombia on November 27, 1997.

8. Based on and in consideration of said verbal agreement to divided custody, and to not interfere in any manner to said divided custody arrangement, Mr. Isidoro Rodriguez, Esq., signed a property settlement agreement in October, 1996, renouncing his rights to all real and personal property acquired jointly after the marriage in 1988, and gave clear title of the family residence to Respondent.

9. Subsequently, in March, 1997, when Master Isidoro Rodriguez-Hazbun and Mr. Isidoro Rodriguez, Esq. were preparing to go the Paris, France for Easter Vacation, on or about March 11, 1997, in violation of the divided custody agreement,

Respondent Ms. Amalin Hazbun Escaf filed a Complaint for Sole Custody, and sought and obtained an *ex parte* temporary order issued by the 1st Family Court of Barranquilla, restricting Petitioner Master Isidoro Rodriguez-Hazbun to visits with his father Mr. Isidoro Rodriguez, Esq., to only alternate Saturday visits of eights hours from 8 a.m. to 6 p.m.

10. Other incidents in violation of agreement of divided custody, and in attempts to intimidate, coerce and emotionally abuse Petitioner Master Isidoro Rodriguez-Hazbun bond of affection with his father Mr. Isidoro Rodriguez, Esq. are as follows:

a. During the period of April 4, 1997 to July 30, 1997, the Respondent repeatedly kept Petitioner Master Isidoro Rodriguez-Hazbun up late the night before and delayed in permitted the beginning of his time with his father.

b. Threatened to have Petitioner's father, Mr. Isidoro Rodriguez, Esq., as a North American forcibly removed from the Republic of Colombia by the national police.

11. These actions of Respondent did place Petitioner Master Isidoro Rodriguez-Hazbun in continued fear for his and his father's safety.

12. All filings by Petitioner's father, Mr. Isidoro Rodriguez, Esq., to obtain a hearing by the Court in Barranquilla of the above incidents, and for the Court to meet with Petitioner Master Isidoro Rodriguez-Hazbun, have been refused. The Court stated that it was not responsible to compel Respondent to communicate with Mr. Isidoro Rodriguez, Esq., on any issue regarding Petitioner Master Isidoro Rodriguez-Hazbun based on the father being a North American, and not part of the Colombian society.

13. Because of the Judge in Barranquilla Family Court's above stated position and refusal to reconsider her temporary order limiting Petitioner Master Isidoro Rodriguez-Hazbun's access and time with his father, Mr. Isidoro Rodriguez, Esq. entered into an agreement on July 27, 1997, modifying the verbal agreement of divided custody. This modified agreement

provided for joint custody, with the primary residence being with Respondent during the school week, the dividing of holidays, and for alternative week-ends stays at Petitioner's father home.

14. Subsequent to the agreement, and particularly beginning in 1999, greater civil unrest has occurred in all of the Republic of Colombia, such that the United States Department of States warns United States citizens against travel to Colombia, because "[m]ore than 3,000 people are kidnaped each year throughout Colombia, and there is greater risk of being kidnaped than in any other country in the world." (Petitioner Exhibit 2).

15. Kidnaping of U.S. citizen children has occurred, because "[c]hildren and foreigners are increasingly targeted, apparently because kidnappers believe they will fetch the highest ransoms." (Petitioner's Exhibit 3).

16. The danger has become so critical in Colombia that the Government of the Republic of Colombia has reported that there has been an "exodus" of Colombian citizen 600,000 and foreigners from that country since 1999. (Petitioner's Exhibit 4)

17. Regarding the above cited change of circumstances and as to the best interest of the minor child Petitioner Master Isidoro Rodriguez, Respondent Amalin Hazbun Escaf refuses to communicate in any manner with Petitioner's father Isidoro Rodriguez, Esq. regarding any issue concerning Petitioner Master Isidoro Rodriguez safety or welfare, refuses even to discuss with Petitioner Master Isidoro Rodriguez-Hazbun his own increasing awareness and concerns for his safety and welfare, and refusing to discuss with Petitioner his desire to spend more time with his father, and to live with his father in the United States. In reaction Respondent Ms. Amalin Hazbun Escaf and her family have increasingly expressed to Petitioner Master Isidoro Rodriguez-Hazbun anti/negative United States opinions and sentiments.

19. Despite repeated filings the Family Judge in Barranquilla, Colombia refuses to consider the above, and refuses to require communications by Respondent on this issue, and still refuses to hear Petitioner, and also demonstrates a disregard of

Petitioner Master Isidoro Rodriguez status and rights as a citizen of the United States.

20. Petitioner Master Isidoro Rodriguez-Hazbun recently determined that it was in his best interest to stay in the United States and not to return to the Republic of Colombia. Petitioner is now in the process of registering for the next academic year at the Fairfax County Mark Twin Middle School, 4700 Franconia Road, Alexandria, Virginia.

21. Based on the best interests of the minor child of the parties Petitioner Master Isidoro Rodriguez-Hazbun, as a United States citizen requests that responsibility for his care and sole custody be granted to the father, Mr. Isidoro Rodriguez, Esq.

WHEREFORE, the Petitioner Master Isidoro Rodriguez-Hazbun prays that his father, Mr. Isidoro Rodriguez be granted temporary and permanent sole custody; that the Respondent Ms. Amalin Hazbun Escaf be ordered to pay reasonable sums for the support and maintenance of Master Isidoro Rodriguez-Hazbun in accordance with the order now in place, both while this suit is pending and following entry of a final decree;[2] that upon entry of a final decree in this matter, the Court grant the Petitioner Master Isidoro Rodriguez-Hazbun all rights and remedies afforded by Virginia Code § 20-124.1, and § 20-124.3(7), as well as the above cited relevant precedents of the Courts of Virginia; that the Respondent Ms. Amalin Hazbun Escaf be enjoined from threatening, harassing, harming, or abusing either the Petitioner Master Isidoro Rodriguez-Hazbun or Mr. Isidoro Rodriguez, Esq. in any way; and that the Petitioner Master Isidoro Rodriguez-Hazbun may have such other and further relief as the nature of this case may require, including the ordering that medical and school

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[2]Mr. Isidoro Rodriguez, Esq., since 1996 has paid monthly for private school tuition and approx. $500 a month to Respondent Amalin Hazbun Escaf for the child support.

records be sent to Petitioner's father so to permit registration in the above referenced school.

Respectfully submitted,

Master Isidoro Rodriguez-Hazbun

Isidoro Rodriguez, Esq.
Virginia State Bar No. 21573
Fairfax Bar Assn. No. 39242
Counsel for Petitioner

**U.S. CONSTITUTION, AMENDMENT V,** provides in pertinent part, that:

> No person shall be . . . deprived of life, liberty or property without due process of law.

**U.S. CONSTITUTION, AMENDMENT IX,** provides in pertinent part, that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage other retained by the people.

**28 U.S.C. § 2403 - Intervention by United States or a State; constitutional question.**

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

**Federal Rules of Civil Procedure Rule 19, reads in pertinent part that:**

**Joinder of Persons Needed for Just Adjudication**

(a) Persons to be Joined if Feasible.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder.

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision

(a)(1)--(2) hereof who are not joined, and the reasons why they are not joined.

**Federal Rules of Civil Procedure Rule 52(b), reads in pertinent part that:**

. . . . When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the finding may be later questioned whether or not in the district court the party raising the question objected to the findings, moved to amend them, or moved for partial findings.

**Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention), Oct. 25, 1980, T.I.A.S. No 11,670, 19 I.L.M. 1501**

Art. 13 Notwithstanding the provisions of the proceeding Article, the judicial. . . authority of the requested State is not bound to order the return of the child if the person . . . opposes it return establishes that-

> b) there is a grave risk that his . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.
>
> The judicial . . . authority may refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

Article 20 The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom.

Art 35 This Convention shall apply as between Contracting States only to wrongful removals or retentions . . . .

**The International Child Abduction Remedies Act, Pub Law 100-300 ("ICARA"), 42 U.S.C. §§ 11601-11610**

42 U.S.C. § 11603

(a) Jurisdiction of courts:

The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention.

(b) Petition

Any person seeking to initiate judicial proceedings under the Convention for the return of a child . . . may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(e) Burden of proof

(1) A petitioner in an action brought under subsection (b) of this section shall establish by a preponderance of the evidence-

(A) in the case of an action for the return of a child, that the child has been wrongfully . . . retained within the meaning of the Convention; and . . . .

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing-

(A) by clear and convincing evidence that on of the exceptions set forth in article 13(b) or 20 of the Convention applies; and

(B) by a preponderance o the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

42 U.S.C. 11604(b) Limitation of authority

No court exercising jurisdiction of an action brought under section 11603(b) of this section, order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.

**22 CFR 94.4 Prohibitions**

(A) The U.S. Central Authority is prohibited from acting as an agent or attorney or in any fiduciary capacity in legal proceedings arising under the Convention.

**Department of State, Federal Register, Vol. 51 No. 58**

AT PAGE 10504, ¶I.A. "Notwithstanding, the general application of the Convention to children under sixteen, it should be noted that the wishes of mature children regarding their return are not ignored, by the Convention. Article 13 permits, but does not require the judicial authority to refuse to order the child returned if the child "objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views." The rule of the child's preference in return proceedings is discussed further at III.I(2), *infra.*

AT PAGE 10507, "¶iii. Custody rights arising by reason of agreement having legal effect. Parties who enter into a private agreement concerning a child's custody have recourse under the Convention if those custody rights are breached. Article 3. . . . In the U.S. view, the provision should be interpreted expansively to cover more than only those agreements that have been incorporated in or referred to in a custody judgement. *Actes et documentes de Quartorzieme Seesion. (1980) Volume III. Child Abduction,* Comments of Governments at 240. The reporter's observations affirm a broad interpretation of this provision:. . . ."

AT PAGE 10510. ¶(d)*Child's preference* The third unlettered paragraph of Article 13 permits the court to decline to order the child's returned if the child objects to being returned and has obtained an age and degree of maturity at which it is appropriate to take account of the child's view.

AT PAGE 10510, ¶3. Article 20. Article 20 limits the return obligation of Article 12. It states: "The return of the child under the provisions of Article 12 may be refused if this wold not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedom." This provision was to be invoked "**on the rare occasion that return of the child wold utterly shock the conscience of the court or offend all notions of due process.** . . . The following explanation of Article 20 is excerpted form paragraph 118 of the Perez-Vera Report at pages 461-2:"

> . . . [Article 20] is concerned only with the principles accepted by the law of the requested State, either through general international law and treaty law, or through internal legislation. **Consequently, so to be able to refuse to return**

**a child on the basis of this article, it will be necessary to show that the fundamental principals of the requested State concerning the subject-matter of the Convention do not permit it**; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.(Emphasis added)

**Virginia Code 20-124.3. Best interests of the child; visitation.**

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendent lite orders pursuant to ° 20-103, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

....

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

....

5. The role which each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

....